Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1998

MICHAEL J. McEACHERN,
Petitioner,

vs.

JOHN T. BLACK
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for South Carolina

PETITION FOR WRIT OF CERTIORARI

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Petitioner

38pp

QUESTION PRESENTED

Whether the judicial immunities defined in existing case law can be enlarged to the extent effected in the *McEachern v. Black* decision without violating the intention of the Court in those cases.

PARTIES TO THE PROCEEDING BELOW

The parties before this Court are those whose names are set forth in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding Below	ii
Table of Contents	iii
Table of Citiations	iv
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Background	2
Procedural History	3
Reasons for Granting the Writ	5
Conclusion	9

TABLE OF CITATIONS

Cases Cited: **Page**

Stump v. Sparkman, 435 U.S. 349 (1978) 5, 6

Forrester v. White, 484 U.S. 219 5

Pulliam v. Allen, 466 U.S. 522 5

McAlester v Brown, 469 F.2d 1280 (1972) 6

Bradley v. Fisher, 13 Wall., at 347 (1872) 6, 7

PETITION FOR WRIT OF CERTIORARI

Michael J. McEachern respectfully petitions for certiorari to review the judgment and opinion of the South Carolina Court of Appeals in *Michael J. McEachern v. John T. Black.*

OPINIONS BELOW

The Honorable Henry L. McKellar, as Presiding Judge for the Fourteenth Judicial Circuit of South Carolina, executed an Order of Dismissal on June 27, 1996. Judge McKellar concluded that Respondent John T. Black was protected from Petitioner's suit for damages by judicial immunity. That Order is reprinted here in Appendix at 9a - 15a. The opinion of the South Carolina Court of Appeals, filed January 26, 1998, is reported at 496 S.E.2d 659, and is reprinted in the Appendix here at 1a - 8a. A Petition for Rehearing was denied by the Court March 19, 1998, and the Order so denying is reprinted in the Appendix here at 22a. The Supreme Court of South Carolina was petitioned for Writ of Certiorari, and that petition was denied November 19, 1998. That Order is reprinted in the Appendix at 23a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a).

As the Order of the South Carolina Supreme Court denying certiorari was dated November 19, 1998, this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States: Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1983 provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law..."

STATEMENT OF THE CASE

A. Background

Petitioner Michael J. McEachern manages The Roof Doctor, Inc., ("The Roof Doctor") a small construction firm specializing in metal roofing. He has since 1991 also acted as the director of a not-for-profit interest group, CourtWatch, which has as its purpose "the rehabilitation of South Carolina's legal profession and judiciary." In paid ads as well as in correspondence with representatives of the legal profession and judiciary, the tone of CourtWatch is harsh.

Respondent John T. Black is a retired family court judge. At the time of the incident which led to the case here, he was already retired, but was serving on the bench under some special arrangement, presumeably because of the chronic overload family courts face. Over the years he and petitioner had had numerous differences of opinion; on occassion those differences resulted in respondent's jailing petitioner for contempt of court. The contempt and disagreement had been over failure to obey an order for child support. Petitioner read the Support Guidelines to give an out-of-work parent, unless there was some indication the unemployment was intentional, a non-contemnor status; the judge read them differently.

Bernard Jamerson was at the time of the incident which led to this matter a young employee of The Roof Doctor. He was living without electricity and with a blue poly tarp keeping rain out of his "trailer house," heating with the propane cook stove.

On or about October 3, 1995, Jamerson requested that McEachern write a letter to South Carolina Department of Social Services ("DSS") explaining that The Roof Doctor did not offer health insurance to its employees. DSS, through one Vernee C. Hancock, was threatening to bring Jamerson before the Family Court on contempt charges for not providing his children with health insurance as he had been ordered. Even with the letter written, though, Jamerson would likely have to miss a good part of a day to take care of the matter. The letter which McEachern wrote Ms. Hancock was childish and exceedingly uncomplementary.

B. Procedural History

This action was commenced by the filing of a Summons and Complaint with the Colleton County Clerk of Court on March 6, 1996. Plaintiff, the Petitioner herein (McEachern), alleged that the Defendant John T. Black, while sitting as the Presiding Judge of the Beaufort Count Family Court, and particularly while Judge Black was presiding at a hearing in *South Carolina Department of Social Services v. Jamerson* (87-DR--07-538), issued a Rule to Show Cause directing McEachern to appear to be heard at a contempt hearing. The Complaint alleged five separate claims, four state tort claims and one federal constitutional claim, all arising from Judge Black's issuance of the Rule to Show Cause, and sought money damages from John T. Black personally. (Complaint is reprinted here in the Appendix at 16a - 21a.)

On March 20, 1996, the Defendant Black filed a Notice of Motion and Motion to Dismiss asserting that Plaintiff's action was barred by common law judicial immunity and the statutory immunities of the South Carolina Tort Claims Act. The Motion also requested that the trial court take judicial notice of the Beaufort County Family Court records in *South Carolina Department of Social Services v. Jamerson* and *Family Court of Beaufort County v. McEachern.*

On May 22, 1996, Judge Black's Motion to Dismiss was heard by the Honorable Henry L. McKellar, Presiding Judge, Fourteenth Judicial Circuit. On May 31, 1996, Judge McKellar issued a Bench Order granting the Defendant's Motion to Dismiss, and instructing defense counsel to prepare a formal

order. That formal Order was executed by Judge McKellar on June 27, 1996, and filed July 2, 1996. (This Order is reprinted here in the Appendix at 9a -15a.) The Court of Common Pleas concluded that "[t]he prosecution of this action is barred by judicial immunity."

(Please note that while the Order claims that

> ...the Family Court records show that McEachern had, in fact, appeared before the court in the *Jamerson* matter, in his capacity as Jamerson's employer. Specifically, the file maintained by the Clerk of Court shows that McEachern had filed both a Notice of Withholding and a Payor/Employer's Answer regarding Jamerson's support obligation,

inspection of the Payor's Answer referred to shows the signature to be that of The Roof Doctor's office manager, Melissa McAlhaney, not Michael McEachern. Petitioner was never before the family court in this matter.)

The federal questions included in the Complaint were not addressed by the lower court or by the appellate courts, as the matter was foreclosed by dismissal.

REASONS FOR GRANTING THE WRIT

First, the importance of our courts to order depends on the respect of the people. If it comes to be generally believed that judges act without accountability, order will diminish.

Second, the reasoning found in the majority opinion in *Stump*, a controlling case in defining judicial immunity, is sloppy; disingenuousness is evident. If we must have a standard of judicial immunity as strong as *Stump*, let it be well articulated.

JUDGES MUST BE SEEN AS BEING IN SOME WAY ACCOUNTABLE TO LAWFUL PROCESSES. IN THIS CASE, JUDICIAL IMMUNITY IS EXTENDED TO ALLOW JUDGES SO DISPOSED TO PUNISH WITH IMPUNITY PARTIES NEVER BEFORE THEM FOR WHAT MOST WOULD TAKE TO BE ACTIONS PROTECTED BY THE FIRST AMENDMENT.

Case law has long underpinned the notion of judicial immunity as essential to the administration of justice, supporting the concept even against allegations of judicial malice and corruption. There are apparently only three exceptions to a judge's immunity from suit: "First, no judicial immunity exists if the judge acts in the 'clear absence of all jurisdiction.' *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). Second, judicial immunity extends only to judicial acts. *Forrester v. White*, 484 U.S. 219 (1988). Finally, judges cannot claim judicial immunity for suits seeking only prospective, injunctive relief. *Pulliam v. Allen*, 466 U.S. 522 (1984)." *McEachern v. Black*, 329 S.C. 642, 648 (Ct.App. 1998). The first two were used to support Judge Black's position.

Examining these and the prior cases they reference, we find that the judicial immunity they describe does not apply to *McEachern v. Black*. Quoting from *Stump* (page 362):

> The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial'

> one relate to the nature of the act itself i.e., whether it is a function normally performed by a judge, and to **the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity**." (Emphasis added.)

But McEachern did not deal with Black in his judicial capacity or any other capacity. In response to a request from an employee, he wrote a letter to an attorney and in that letter made comments disparaging the legal profession and judiciary of South Carolina.

Further, the *Stump* opinion cites with approval the reasoning of the Court of Appeals for the Fifth Circuit, which held judicial immunity protected a state district judge's irregular use of the contempt process, noting:

> Among the factors relied upon by the Court of Appeals in deciding that the judge was acting within his judicial capacity was the fact that 'the confrontation arose **directly and immediately out of a visit to the judge in his official capacity**.' (Emphasis added.) *McAlester v. Brown*, 469 F.2d 1280, 1282 (1972)

This was not the case in *McEachern v. Black.*

Indeed, the underlying rationale by which judicial immunity is justified cannot be said to apply in *McEachern v. Black.* Again from *Stump* (page 364), this time quoting from an 1872 case:

> Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of 'the proper administration of justice [for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions without apprehension of personal consequences to himself.' *Bradley v. Fisher*, 13 Wall., at 347.

"[T]o act upon his own convictions" is the key phrase, and it is

not at all the same as "to do as he pleases," though the majority opinions of several immunity decisions come close to saying this. The license the courts have used is plausible: Allegations of maliciousness or corruption are easily made; they cannot be judged without trial; to have judges subjected to lawsuits from disgruntled litigants would make the system unworkable. But against this considerable good, the efficient and impartial administration of the courts, we must always weigh the public's right to accountability from their servants.

Accountability is not a creation of the law, but rather the other way around. Oliver Wendall Holmes put it succinctly: "The law is founded in vengeance." When the public's right to vengeance, or accountability, is diminished, there had better be something of value offered in exchange. In *McEachern v. Black* there is not. The letter which so incensed Judge Black was not addressed to him or to his court. The opinion of McEachern about the caliber of the State's legal profession and judiciary was entirely irrelevant to the proceedings before the court, and in fact need not have been offered to the judge by the attorney / addressee at all.

We may assume with perfect logical consistency that if the definition of judicial immunity used in *McEachern v. Black* is allowed to stand, hereafter persons may be cited for contempt for using, in correspondence with anyone at all, a font or format not favored by the presiding judge, so long as that correspondence contains some reference, however tenuous, to a matter before the court, and on some pretext or other finds its way into the courtroom. In fact, hereafter editorials disparaging a judge or even of the shortcomings of the judiciary generally, may result in contempt citations for the author and publisher, should there by chance be in the same paper some reference to an ongoing case. This is where the *Stump*'s "clear absence of all jurisdiction" test takes us in *McEachern v. Black*.

Until he was faced with a lawsuit for money damages, Judge Black himself felt he lacked jurisdiction, and had admitted so. In response to a letter from the A.C.L.U. pointing out Judge Black's lack of jurisdiction in the matter, the Judge, on November 30, signed a "Motion and Order for Dismissal" which stated that "based on the letter of November 20 from C. Rauch Wise,

[A.C.L.U.] Attorney, the Rule to show Cause dated October 13, 1995 is hereby dismissed."

In none of the cases cited was judicial immunity related to the possible dollar cost lof a judge's misdeeds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Appendix A -- Opinion of the South Carolina Court of Appeals Filed January 26, 1998 ..... 1a

Appendix B -- Order of Dismissal from the Circuit Court, June 27, 1996 ..... 9a

Appendix C -- Complaint, February 29, 1996 .....16a

Appendix D -- Denial of Petition for Rehearing South Carolina Court of Appeals Dated March 19, 1998 ..... 22a

Appendix E -- Denial of Petition for Certiorari Supreme Court of South Carolina Dated November 19, 1998 .....23a

APPENDIX A -- OPINION OF THE SOUTH CAROLINA COURT OF APPEALS FILED JANUARY 26, 1998

McEACHERN v. BLACK, 329 S.C. 642 (Ct.App. 1998)

496 S.E.2d 659

Michael J. McEachern, Appellant,

v.

John T. Black, Respondent.

Opinion No. 2785

Court of Appeals

Heard December 4, 1997

Filed January 26, 1998

Appeal from Beaufort County, L. Henry McKellar, Circuit Court Judge.

AFFIRMED

James Lee Murphy, of Hilton Head Island, for appellant.

Edwin E. Evans, of the Office of General Counsel, State Budget and Control Board, of Columbia, for respondent.

HOWARD, J.:

Michael J. McEachern appeals the dismissal of his complaint against John T. Black, a family court judge. We agree

with the trial court's determination that Judge Black is entitled to judicial immunity and affirm.

FACTS

This case arises out of actions stemming from *South Carolina Department of Social Services v. Jamerson,* (87-DR-07-538). In *South Carolina Department of Social Services v. Jamerson,* the family court ordered Jamerson to provide child support and health insurance for his minor children. Jamerson defaulted on his child support payments. To avoid a hearing, Jamerson agreed to have his
wages withheld to satisfy his obligation.

Thereafter, Jamerson failed to provide the insurance for his minor children as ordered by the court. Accordingly, the Beaufort County clerk issued a complaint and rule to show cause to Jamerson. Attached to the complaint were instructions for Jamerson's employer to provide information describing the availability of health insurance. Michael McEachern, an employee of Roof Doctor, subsequently issued a letter on Roof Doctor letterhead to the Department of Social Services attorney assigned to the matter. The letter contained the following:

As Bernard Jamerson's employer, I have been asked to explain to you that Bernard has no health coverage available at work. This is a common predicament among people who are not fortunate enough to be employed by the government or a large corporation. It is our hope to be able to offer some sort of plan within the next year.

It is remarkable and infuriating to met that a hard working man is hassled and caused to waste a workday sitting in a courtroom because our State's judges and lawyers haven't got a clue to what's reality for the productively employed population. Contemp for what? For him to be in contempt, he has to have an option. If you want to know why Bernard has no health insurance - or if the Honorable One does - let me make a suggestion: get a real job. Until then, though, please leave this man alone.

Yours very truly,
s/ Michael J. McEachern

During the hearing on Jamerson's failure to provide insurance, the DSS attorney presented McEachern's letter to the presiding judge, Judge Black. Judge Black determined that McEachern should be brought before the court to show cause why he should not be held in contempt. The family court clerk later issued a rule to show cause and notice of hearing to McEachern.

McEachern retained the services of an attorney to represent him in the contempt hearing. The attorney wrote Judge Black requesting a dismissal of the rule to show cause. Before McEachern filed a formal response, Judge Black entered a dismissal of the rule to show cause based on the attorney's request. The hearing was thereby canceled.

McEachern filed a complaint against Judge Black, alleging abuse of process, malicious prosecution, intentional infliction of emotional distress, violation of civil rights, and negligence.

Judge Black filed a motion to dismiss McEachern's complaint. The trial court granted Judge Black's dismissal based on judicial immunity. McEachern appeals the trial court's order granting the
dismissal.

SCOPE OF REVIEW

A trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). Judicial immunity affords absolute immunity from suit. *Stump v. Sparkman*, 435 U.S. 349 (1978). Therefore, a finding of judicial immunity renders a complaint alleging judicial misconduct meritless.

LAW/ANALYSIS

I.

McEachern argues that the trial court erred in finding that Judge Black was entitled to judicial immunity for his actions.

Judicial immunity is one of the fundamental pillars upon which the modern system of justice was built. As early as 1871, the United States Supreme Court recognized the importance of judicial immunity by holding, "[t]he principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well ordered system of jurisprudence." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Without judicial immunity, losing parties would vent their ire on the presiding judge. Id. at 348. Court dockets would explode and those willing to expose themselves to the lawsuit-prone job of judge would cower under the constant threat of legal retribution for good-faith errors. Id. at 347. Simply stated, absolute judicial immunity is vital for the continuation of an independent judiciary and for the preservation of judicial integrity.

Judicial immunity, however, is not without limitations. The Supreme Court has carved out three exceptions. See Erwin Chemerinsky, Federal Jurisdiction § 8.6 (2d ed. 1994). First, no judicial immunity exists if the judge acts in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). Second, judicial immunity extends only to judicial acts. *Forrester v. White*, 484 U.S. 219 (1988). Finally, judges cannot claim judicial immunity for suits seeking only prospective, injunctive relief. *Pulliam v. Allen*, 466 U.S. 522 (1984).

In this case, whether Judge Black can invoke judicial immunity depends on (1) whether he acted in the clear absence of all jurisdiction by issuing the rule to show cause to McEachern or (2) whether issuing the rule to show cause was a non-judicial act. Because McEachern does not seek prospective, injunctive relief, the third exception to judicial immunity does not apply in this case.

II.

McEachern argues that Judge Black was acting outside the scopeof his jurisdiction in issuing a rule to show cause because McEachern was not a party to the underlying

litigation. The appropriate test for determining whether a judge acts in clear absence of all jurisdiction for the purposes of judicial immunity has been outlined by the United States Supreme Court. In *Stump v.Sparkman*, the Supreme Court stated that

> [t]he necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him.

435 U.S. 349, 356 (1978) (emphasis added).

Subject matter jurisdiction is the power of a court to "hear and determine cases of the general class to which the proceedings in question belong." *Brown v. Evatt*, 322 S.C. 189, 193, 470 S.E.2d 848, 850 (1996); *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994).

The Supreme Court of South Carolina has held that presiding family court judges in South Carolina have contempt power. *Curlee v. Howle*, 277 S.C. 377, 287 S.E.2d 915 (1982). "The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." *Id.* at 382, 287 S.E.2d at 917. Thus, Judge Black was not acting outside of the subject matter jurisdiction of his court in issuing a rule to show cause for contemptuous behavior and, accordingly, was not acting in clear absence of all jurisdiction.[fn1]

III.

McEachern argues that Judge Black's rule to show cause was not a judicial act because (1) Judge Black issued the rule to show cause sua sponte and (2) the rule to show cause amounted to a slander or defamation claim which should have been brought in a
circuit court. McEachern's arguments reflect a fundamental misunderstanding of the law of contempt.

First, judges have the authority to sua sponte use contempt proceedings to preserve the authority and dignity of their courts. *State v. Blanton*, 278 S.C. 597, 300 S.E.2d 286 (1983); *Long v. McMillian*, 226 S.C. 598, 86 S.E.2d 477 (1955); 17 C.J.S. Contempt § 63 (1963) ("The court, without complaint, may of its own motion, institute proceedings to punish for offenses against its dignity and authority, although the contempt was not, strictly speaking, committed in the presence of the court."). Further, even if Judge Black had improperly issued the rule to show cause, the error would not have rendered his act non-judicial in nature. *Stump v. Sparkman*, 435 U.S. 358 (1978).

> A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors.The Court made this point clear in *Bradley*,[80 U.S.] 13 Wall., at 357, [20 L.Ed. 646], where it stated: "[T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act. . . ."

Id. at 359.

Second, Judge Black was not pursuing a personal claim against McEachern, which would have warranted a separate summons and complaint. Judge Black sought no monetary retribution from McEachern. Even if Judge Black had been maliciously pursuing the contempt action, judicial immunity would still protect his actions as long as the act was judicial in nature. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. 335 (1871). *See also Stump v. Sparkman*, 435 U.S. 349 (1978) (Stewart, J., dissenting).

Finally, rules to show cause and contempt proceedings are inherently judicial acts. *Crooks v. Maynard*, 913 F.2d 699 (9th Cir. 1990). See *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("[F]actors determining whether an act by a judge is a judicial one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge."). Judge Black was acting in his official capacity, performing an act

normally performed by judges exercising their contempt powers. The issuance of the rule to show cause was, therefore, a judicial act for which Judge Black can claim judicial immunity.

Apparently, McEachern misconstrues the Supreme Court's holding in *Forrester v. White*, 484 U.S. 219 (1988). In *Forrester*, the Court held that a judge did not have judicial immunity for firing a probation officer. Id. at 230. The Court thus created a distinction between judicial and administrative decisions, with judges receiving judicial immunity only for judicial functions. *Forrester* is inapplicable in the present case because Judge Black was acting in a judicial, not administrative, capacity.

IV.

Without any citation to precedent, McEachern argues that Judge Black's dismissal of the rule to show cause constitutes res judicata which bars Judge Black from arguing judicial immunity. We disagree.

The essential elements of res judicata require: "(1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in their first; and (3) the second action must involve matter properly included in the first action." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). Because Judge Black expressly dismissed the case "without prejudice to the rights of either party," Judge Black's dismissal of the rule to show cause does not satisfy the first element of a final and valid judgment on the merits. "A dismissal of a case`without prejudice' means that the plaintiff can reassert the same cause(s) of action by curing the defects that led to dismissal. By contrast, dismissals with prejudice are intended to bar relitigation of the same claim.'" *Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) (citing Friedenthal, Kane & Miller, Civil Procedure 651 (1985)). Thus, because the dismissal was made without prejudice to either party, res judicata does not apply and we need not address the other two elements.

V.

In conclusion, we hold that judicial immunity shields Judge Black from McEachern's suit. When Judge Black issued the rule to show cause to McEachern, Judge Black performed a judicial act which was not done in the clear absence of all jurisdiction. In addition, res judicata does not apply to Judge Black's dismissal of the rule to show cause to prevent Judge Black from claiming
judicial immunity. Accordingly, the decision of the trial court is

AFFIRMED.

HEARN and STILWELL, JJ., concur.

[fn1] Because Judge Black dismissed the rule to show cause, we need not address the merit of the contempt claim.□

APPENDIX B -- ORDER OF DISMISSAL FROM THE CIRCUIT COURT, JUNE 27, 1996

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	IN THE COURT OF COMMON PLEAS
Michael J. McEachern, Plaintiff, v, John T. Black, Defendant.	C/A No.96-CP-15-169 ORDER OF DISMISSAL

This matter comes before the Court for hearing on May 22, 1996, upon Defendant's Rule 12 (b) Motion to Dismiss. Plaintiff's action is dismissed.

INTRODUCTION

The Summons and Complaint in this Action were served upon John T. Black on March 6, 1996. The Complaint asserts that John T. Black, a retired Family Court Judge, while sitting as a Family Court Judge, issued a Rule To Show Cause directed toward Michael McEachern, arising out o the case of *S.C. Department of Social Services v. Bernard Jamerson.* According to the Complaint, the Rule to Show Cause directed McEachern to appear before the Court to show cause why he should not be held in contempt of Court, on account of opinions expressed in a letter McEachern had written concerning facts in the *Jamerson* case.

The Rule To Show Cause was dismissed without prejudice before the scheduled hearing, and McEachern was never adjudicated to be in contempt of court. Nevertheless, based upon the Family Court's direction that a Rule to Show Cause issue, the Complaint alledged the following causes of

action: (1) abuse of process, (2) malicious prosecution, (3) intentional infliction of emotional distress, (4) violations of 42 U.S.C. §§ 1983 and 1988, and (5) negligence. The Complaint prayed for damages against the individual Defendant in the amount of $28,000. compensatory damages, plus exemplary and punitive damgages.

On March 19, 1996, Defendant filed a Motion to Dismiss. The Motion asserted the action was barred by the common law doctrine of judicial immunity, and also asserted the action was barred by the statutory immunities prescribed in S.C. Code Ann. § 15-78-60 (1) and (23) (Cum. Supp. 1995). The Motion to Dismiss also requested this Court to take judicial notice of related judicial department records, pleadings, and orders in the cases of *D.S.S. v. Jamerson* and *Family Court of Beaufort County v. McEachern.* Without objection, this Court did take judicial notice of records in the referenced Family Court proceedings. The critical issue to be decided by this Court is whether judicial immunity applies to the allegations in this case. The Court will not sustain a Motion to Dismiss if the facts alleged in the Complaint, and the inferences reasonably deducible therefrom, will enable the Plaintiff to any relief on any theory of the case. *Stiles v. Onorator*,____ S.C. _____, 457 S.E.2d 601 (1995); *Benson v. United Guaranty Residental Ins. of Iowa*, _____, S.C._____, 445 S.E.2d 647 (Ct.App.1994).

LAW

Judicial immunity is said to be as "old as the law." *Randall v. Brigham*, 74 U.S. (7 Wall) 523, 536, 19 L.Ed, 285 (1868). It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, must be free to act upon his own convictions, without apprehension of personal consequences to himself. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Moreover, the South Carolina Tort Claims Act prescribes an absolute immunity for a loss resulting from judicial action or inaction, as well as for any loss resulting from institution or prosecution of any judicial or administrative proceeding. §§ 15-78-60 (1) and (23), Code of Laws of South

Carolina (Cum. Supp. 1995).[1]

Judicial immunity may be overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Mireles v. Waco*, 502 U.S. ____, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). The factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge. *Stump v. Sparkman*, 435 U.S. 349,362, 98 S.Ct. 1099, 55 L. Ed. 2d 331 (1978).

Second a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Mireles.* The scope of a judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. like other forms of absolute immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages; thus, it is properly considered at the pleading stage. In addition, judicial immunity is not overcome by allegation of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. *Id.* A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." *Stump.*

JUDICIAL IMMUNITY APPLIES TO THIS CASE

(a) The Action Was Taken In a Judicial Capacity

For purposes of judicial immunity analysis, this Court need not examine the content of the letter, nor the propriety of issuance of the Rule to Show Cause. The only factor relevant to this, first prong, of the common law judicial immunity analysis is whether the defendant was acting in a judicial capacity when he issued the Rule to Show Cause directed toward McEachern.

Records before this Court show that Judge Black, as Family Court Judge, presided over a Rule to Show Cause

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[1] Although one count of the Complaint alleges violations of 42 U.S.C. § 1983, judicial immunity also applies to actions brought under this Federal Code section. *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

hearing in the case of *S.C. Department of Social Services v. Bernard Jamerson.* This Court has taken judicial notice of the official transcript in the proceeding before Judge Black. The content of the letter leaves no doubt that the Judge Black dealt with McEachern, and McEachern with the Judge, in his judicial capacity. The letter was presented and published in open court in the *Jamerson* proceedings.

The issue in the *Jamerson* case involved Jamerson's failure to provide medical insurance for a dependent child. The Department of Social Services, in its pursuit of that action, requested Jamerson's employer, McEachern, to provide information regarding whether insurance was provided for employees. In his response letter, McEachern made certain remarks which were not only disparaging of the judicial system generally, but which also could be construed as insulting to the judge who issued the Rule to Show Cause and mocking the particular judicial proceeding over which the judge presided and undermining the litigant's respect for the judicial system and judicial process.

The Defendant, in ordering that the Rule to Show Cause issue, was performing a function normally performed by a judge. The Rule was issued during a proceeding an open court, after plaintiff's letter was published as evidence for the purpose of providing information directly relevant to the court proceeding. It goes without saying that the Family Court has inherent poweer to punish as contemptuous any conduct which interferes with judicial proceedings, which exhibits disrespect for the cour, which hampers the parties, or which tends to bring the authority and administration of the law into disrespect. *See Curless v. Howle,* 277 S.C. 377, 287 S.C.2d 915 (1982); *Stone v. Reddix-Smalls,* 295 S.C. 514, 369 S.E.2d840 (1988). Moreover, the Family Court has express statutory quthority to issue contempt orders. S.C. Code § 20-7-1350 (Cum. Supp. 1995). The act which forms the basis of McEachern's Complaint was judicial in nature. The first exception to judicial immunity, act not judicial in character, does not apply.

(b) There Was Not a Complete Absence of Jurisdiction

The second inquiry is whether the action, although judicial in nature, was taken in spite of a complete absence of juisdiction. On this second prong, it is not within the scope of this Court's inquiry to determine whether the action was in

excess of the Family Court's judicial quthority, or even whether the action was done maliciously. *Mireles.* Simply, a judge acting in a judicial capacity is subject to liability only when he has acted in the "clear absence of all jurisdiction." *Stump v. Sparkman, supra.* The inquiry, in examining whether there was a clear absence of jurisdiction, is as to the "nature" and "function" of the act, not the propriety of the "act itself." *Id.* In this case, ther was no "clear absence" of jurisdiction.

This Court further recognizes that Plaintiff was not a complete stranger to the Jamerson proceedings. Section 20-7-1210 requires employers of parents ordered to pay health coverage for children to take certain steps to assist in compliance with the cour order, and § 20-7-1315 imposes certain obligations upon an employer regarding withholding of income of an employee who bas been ordered to pay support. An employer who violates either section is subject to both contempt of court and fine. §§ 20-7-1280; 20-7-1315 (I) (1); 20-7-1350 (Cum. Supp. 1995). The Family Court records show that McEachern had, in fact, appeared before the court in the *Jamerson* matter, in his capacity as Jamerson's employer. Specifically, the file maintained by the Clerk of Court shows that McEachern had filed both a Notice of Withholding and a Payor/Employer's Answer regarding Jamerson's support obligation.

The Family Court has broad contempt powers. Moreover, the Family Court has inherent and statutory juridiction to direct the issuance of process to initiate a proceeding to determine whether a person, not a party to a pending proceeding, should be held in contempt. Contrary to Plaintiff's assertion, the contempt power or the Family Court is not limited solely to those litigants appearing before that Court. Again, this Court's inquiry is limited to whether there was a "complete absence" of jurisdiction in the Family Court to direct the issuance of a Rule to Show Cause. In light of the facts and law, it clearly cannot be said that the action of the Family Court in issuing a Rule to Show Cause was taken in the "complete absence" of jurisdiction. Therefore, McEachern fails to meet this second prong of the test to overcome the absolute bar of judicial

immunity.[2]

Plaintiff also asserts that judicial immunity is and archaic doctrine that should be abolished. This Court is not convinced that the significant public purpose served by the doctrine of judicial immunity is not longer extent. Moreover, the South Carolina General Assembly has codified judicial immunity in the context of the Tort claims Act.

Plaintiff further attempts to avoid the bar of judicial immunity by contending that the Order issued by the FAmily Court dismissing the Rule to Show Cause in the proceeding entitled Family Court of Beaufort County v Michael J. McEachern.

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[2] Although the Defendant is sued in his individual capacity, the Complaint alleges common law tort claims that would be cognizable only pusuant to the South Carolin Tort Claims Act since the Complaint and the Family Court records make clear that the Defendant was at all times acting in his capacity as Family Court judge for the State of South Carolina. S.C. Code §§ 15-78-10, *et seq.* (Cum.Supp. 1995). As earlier noted the Tort Claims Act codifies absolute immunity for judicial acts as well as the institution or prosecution of any judicial proceeding. §§ 15-78-60 (1), (23). Thus, as to plaintiff's actions cognizable only pusuant to the South Carolina Tort Claims Act the statute provides absolute immunity.
is a judgement bar to the assertion of judicial immunity as a defense in this damage action against the individual judge. This Court rejects immunity as a defense in this damage action against the individual judge. This Court rejects Plaintiff's contention for several reasons. First, the Order issued by the Family Court of Beaufort County was issued without prejudice and was not a determination of the merits of those proceedings. Second, the individual Defendant in this action, John T. Black, was not a party to that proceeding. Third, to the extent that the Order for Dismissal in the Family Court proceeding entered final findings and conclusions, those findings and conclusions do not undermine the application of judicial immunity in a collateral damage action.

CONCLUSION

The prosecution of this action is barred by judicial immunity. The issuance of a Rule to Show Cause directed against Michael J. McEachern, an employer of a litigant in a non-support action in the Family Court, was a judicial act that was not taken in the complete absence of the Family Court's jurisdiction. This pending action is barred by both the statutory and common law immunities and must be dismissed.

Accordingly, **IT IS ORDERED THAT THIS ACTION BE DISMISSED.**

s/L.Henry McKellar, Presiding
Judge
Fourteenth Judicial Circuit

June 27, 1996

APPENDIX C -- COMPLAINT, FEBRUARY 29, 1996

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS FOR THE FOURTEEN JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	
MICHAEL J. McEACHERN Plaintiff	CASE NO. 96-DR-07-39
vs.	(JURY TRIAL DEMANDED)
JOHN T. BLACK Defendant	

Plaintiff complaining of the Defendant would respectfully show to the Court:

1. The Plaintiff, Michael J. McEachern, is a citizen and resident of Beaufort County.
2. Upon information and belief, Defendant John T. Black is a resident of Walterboro, Colleton County, South Carolina.
3. That on October 3, 1995 the Plaintiff McEachern wrote a letter to one Vernee C. hancock in which he expressed some general disapproval of the State's judges and lawyers.
4. The letter was brought to the attention of John T. Black, a retired Family Court Judge, who was at the time acting as Special Judge in a case entitled *South Carolina Department of Social Services vs. Bernard Jamerson*.
5. Judge Black did not approve of the views expressed by Plaintiff Michael J. McEachern, interpreting the letter as saying that John T. Black ought to "get a real job" if he wished to understand "what's reality for the productively employed population," even though the letter made no reference to John T. Black.
6. Because the letter to a third party was critical of the

Court system and because John T. Black had had previous acrimonious dealings with Plaintiff Michael J. McEachern, this page, retired acting Judge issued a Rule to Show Cause to Michael J. McEachern as why he should not be held in contempt of Court. Te Rule to Show Cause was entitled "Judge John T. Black, Family Court of Beaufort County, Plaintiff / Petitioner vs. Michael J. McEachern, Defendant / Respondent" and bore the docket number 87-DR-07-538. There was no summons or complaint on the docket entitled John T. Black, Family Court of Beaufort Couny, Plaintiff / Petitioner vs. Michael J. McEachern, Defendant / Respondent.

7. The Rule to Show Cause commanded Michael J. McEachern to appear before Judge Black on November 29, 1995 at 9:30 a.m. to show cause why he should not be held in contempt of Court and subject to fine and/or imprisonment.

8. Plaintiff McEachern at the time of receipt of the Rule to Show Cause was confined to a wheelchair. He was also attempting to continue to maintain his business, "The Roof Doctor," while recovering.

9. Faced with the prospect of fine and imprisonment for views expressed in a private letter to a third party, McEachern was forced to obtain legal counsel.

10. McEachern and his counsel, James Lee Murphy, also brought the matter to the attention of Rauch Wise, Esq., attorney for the South Carolina American Civil Liberties Union.

11. On November 20, 1995, Mr. Wise, acting on behalf of the ACLU, wrote to Judge Black stating his opinion.

a. That the Rule to Show Cause violated the First Amendment of the United States Constitution;

b. That the Court lacked subject matter jurisdiction since McEachern was not a party before the Court in any way;

c. That proper procedure would require that John T. Black file a prior Summons and Complaint against McEachern to sustain any kind of jurisdiction over McEachern.

12. On November 30, 1995, Judge Black dismissed the Rule to Show Cause for the reasons set forth in Mr. Wise's letter of November 20, 1995. The dismissal was "without prejudice to the rights of either party."

13. Plaintiff McEachern has been a frequent critic of the judicial system in South Carolina, and had published a number

of pieces taking issue with the system and some of its participants. Plaintiff has previously been critical of Judge John T. Black and had expressed the intention to actively oppose his reappointment on grounds of "incompetence."

14. Judge Black knew McEachern and was aware of McEachern's disapproval of him.

15. As a result of the issuance of the Rule to Show Cause which was subsequently ruled to (a) have been beyond the subject matter jurisdiction of this retired Family Court Judge and (b) a violation of the Plaintiff's Constitutional rights; the Plaintiff incurred extensive legal fees and suffered considerable emotional and physical discomfort and pain.

FIRST CAUSE OF ACTION
(ABUSE OF PROCESS)

16. All preceding paragraphs are re-alleged and reaffirmed as if repeated verbatim herein.

17. The Rule to Show Cause amounted to AN ABUSE OF PROCESS, i.e.:

a. Defendant used the legal process to primarily accomplish a purpose not within the scope of the proceeding for which it was designed. The Rule to Show Cause is properly issued to determine the liability for contempt of a party properly before the Court and under some Court Order to do or not do some act. Plaintiff McEachern was not before the Family Court in any capacity at the time of the issuance of the Rule to Show Cause. He was under no obligation to do or not do anything.

b. Nothing in South Carolina Code 210-7-420 defining the jurisdiction of the Family Court gave Defendant Black the authority to issue a Rule to Show Cause against Plaintiff McEachern.

c. The Rule to Show Cause was issued in clear violation of Plaintiff's Constitutional First Amendment rights, maliciousl in itself.

d. The Rule to Show Cause was deliberately designed to punish and imprison the Plaintiff because of the dislike of Defendant Black for Plaintiff McEachern.

e. Defendant was on record for his public criticism of John T. Black.

18. Plaintiff is informed and believes that he is entitled to

actual damages and punitive damages and requests the Courtfor the same.

SECOND CAUSE OF ACTION
(MALICIOUS PROSECUTION)

19. The Rule to Show Cause was issued to Judge John T. Black was:

a. The wrongful issue of a civil process;

b. With malicious intent to harm the Plaintiff McEachern, i.e. subject him tc fine and imprisonment for expressing an opinion that offended Defendant Black.

20. Defendant Black had no authority to issue a Rule to Show Cause.

21. Defendant Black acted with malice toward McEachern, a citizen long critical of the Courts of South Carolina.

22. Plaintiff is informed and believes that he is entitled to an award of actual and punitive damages and requests this Court to award the same.

THIRD CAUSE OF ACTION
(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

23. All preceding paragraphs are re-alleged and reaffirmed as is repeated verbatim herein.

24. Plaintiff McEachern believes that Defendant intentionally, recklessly, wantonly, and miliciously inflicted severe emotional distress on the Plaintiff because the Plaintiff had publicly criticized both the judicial system and in particular, Judge John T. Black.

25. Defendant knew of should have known that severe emotional distress to the Plaintiff would result from his actions.

26. Plaintiff is informed and believes that the threat of fine and imprisonment for exercise of the Constitutionally protected right of speech and expression exceeds all bounds of decency and should be utterly intolerable in a civilized, democratic society.

27. Plaintiff believes that the outrageous conduct of the Defendant was the direct and proximate cause of the Plaintiff's emotional distress.

28. Plaintiff is informed and believes that he is entitled to an award of actual and punitive damages and requests this court to award same.

FOURTH CAUSE OF ACTION
(VIOLATION OF CIVIL RIGHTS)

29. All preceding paragraphs are re-alleged and reaffirmed as if repeated verbatim herein.

30. The aforementioned Defendant deliberately violated the following Constitutional rights of the Plaintiff:

a. Plaintiff's right to free speech and expression under the First Amendment to the United States Constitution and the laws of South Carolina.

b. Plaintiff's right to be tried by and subject to only a Court of competent jurisdiction.

31. Plaintiff believes that the actions of Defendant were deliberate and actionable under Title 42 of the Law of the United States, specifically 42 U.S.C. § 1983 and 1988.

32. Due to the aforementioned Plaintiff McEachern believes that he is entitled to actual and punitive damages as well as any other damages allowed by law and requests this Court to order the same.

FIFTH CAUSE OF ACTION
(NEGLIGENCE)

33. All preceding paragraphs are re-alleged and reaffirmed as if repeated verbatim herein.

34. The Defendant, a former Family Court Judge familiar with the jurisdictional basis of the Family Court, acted with reckless disregard for its jurisdictionla reach by issuing a Rule to Show Cause to Plaintiff, an individual not subject at the time to the jurisdictional reach of the Family Court.

35. Defendant, a lawyer, is charged with having knowledge of the United States Constitution and the Constitution of the Scouth Carolina, recklessly and negligently issued an Order violating the Plaintiff's Constitutional rights to freedom of speech and expression.

DAMAGES

36. As a direct and proximate result of Defendant's actions, the Plaintiff sustained the following damages and losses:

a. In excess of $5,000. in costs and legal fees.

b. Costs for medical treatment expenses

c. Substantial business losses.

d. Severe emotional and physical stress, illness and discomfort.

e. Such other damages as may be determined by theTrier of Fact.

WHEREFORE, Plaintiff prays for a judgment against Defendant in the amount of twenty-eight thousand dollars ($28,000.00) in actual compensatory damages, plus exemplary and pppunitive damages in such amount as the Trier of Fact may deem appropriate; for costs and disbursements of this action and for such other relief as the Court may deem appropriate.

Respectfully submitted.

s/James Lee Murphy
5 Palmetto Business Park
POBox 3143
Hilton Head Island,SC
29928
803/785-5559

Dated 29 day of February, 1996
Beaufort County, South Carolina

APPENDIX D -- DENIAL OF PETITION FOR REHEARING, SOUTH CAROLINA COURT OF APPEALS, MARCH 19, 1998

The South Carolina Court of Appeals

March 19, 1998

James Lee Murphy, Esquire
P.O. Box 3143
Hilton Head Island, SC 29928

Re: McEachern, Michael J. v. Black, John T.

Dear Mr. Murphy:

Your Petition of Rehearing has been denied in the following Order:

"Denied.

s/Kaye G. Hearn , J.
s/H. Samuel Stilwell , J.
s/William L. Howard , J.

Columbia, South Carolina
March 19, 1998."

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S.C. Court of Appeals, in the amount of $7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be destroyed.

Sincerely,
s/Kenneth A. Richstad
CLERK

APPENDIX E -- DENIAL OF PETITION FOR CERTIORARI, SUPREME COURT OF SOUTH CAROLINA, NOVEMBER 19, 1998

The Supreme Court of South Carolina

November 19, 1998

James Lee Murphy, Esquire
P.O. Box 3143
Hilton Head Island, SC 29928

Re: McEachern, Michael v. Black, John T.

Dear Mr. Murphy:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/ Ernest A. Finney, Jr. C.J.
For the Court

November 19, 1998."

By copy of this letter we are advising all interested parties of the action of the action of the Court in this matter.

Very truly yours,
s/ Daniel E. Shearouse
CLERK